United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1418

To be argued by
HARRY C. BATCHELDER, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1418

UNITED STATES OF AMERICA,
Appellee,

—v.—

EDMUND WOLK,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

HARRY C. BATCHELDER, JR.,
RHEA KEMBLE NEUGARTEN,
AUDREY STRAUSS,
Assistant United States Attorneys
Of Counsel.

JUN 18 19

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1418

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND WOLK,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Edmund Wolk appeals from a judgment of conviction entered on August 30, 1976, in the United States District Court for the Southern District of New York after a three day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Information 76 Cr. 314, filed on April 2, 1976, charged Edmund Wolk with four counts of failing to file income tax returns for the calendar years 1969 through 1972, in violation of Title 26 United States Code, Section 7203.

Trial commenced on July 7, 1976 and on July 9, 1976 Edmund Wolk was found guilty on all four counts of the information. On August 30, 1976 Edmund Wolk was

sentenced to one year's incarceration on each of the four counts, with execution of the sentence suspended and the defendant placed on unsupervised probation for two years. Defendant was also fined $2,000 on each count, for a total non-committed fine of $8,000. Defendant was given six months to pay the fine.

Statement of Facts

A. The Government's Case

It was undisputed that Edmund Wolk, a member of the bar who holds a Master of Laws in taxation, filed no tax returns for the years 1969 through 1972. At trial the origins of the tax investigation of Wolk were traced to October, 1971 when Revenue Officer Raymond Meyer of the Withholding Division of the Internal Revenue Service ("IRS") visited Edmund Wolk to investigate delinquent payment of Withholding and Social Security benefits for employees. (Tr. 23-24).* During this interview Wolk stated he had not filed his 1969 and 1970 income tax returns. When asked to explain why this was so, Wolk said they "weren't available," were "unprepared," and "there were no figures." (Tr. 26, 30).

Revenue Officer Meyer returned in January of 1972 and Wolk again admitted that he had not filed the returns and agreed to submit them. (Tr. 25). Meyer made no report to his superiors as to Wolk's failure to file. (Tr. 32).

---

* "Tr." refers to the trial transcript; "GX" refers to Government exhibit; "Br." refers to appellant's brief.

Subsequently, in July of 1973 Revenue Officer Helen Myers interviewed Edmund Wolk about withholding taxes. During this interview Wolk admitted that he failed to file income tax returns for 1971 and 1972 but had applied for extensions to file. (Tr. 33).

On August 17, 1973 Special Agent Anthony Cappacio, of the Intelligence Division of IRS met with Edmund Wolk and his attorney to discuss Wolk's failure to file his income tax for the years 1969 through 1973. (Tr. 79-80, 82). During this interview Wolk confirmed that he had not filed income tax returns for the years 1969, 1970, 1971 and 1972 and that he was aware of the requirement to file. (Tr. 81).* Mr. Wolk stated he had net earnings of about $15,000 a year and, in addition, received $500 per month as a management fee from his father's estate. He further indicated he had no regular books or diaries reflecting his income, except his checking accounts, the deposits for which were derived from income. (Tr. 80, 82, 90). Mr. Wolk stated that although he was previously engaged in a legal partnership with Bernard West, this partnership had terminated in 1968. (Tr. 81).

Special Agent Cappacio visited Edmund Wolk again in October of 1973 at which time Cappacio received some checks from Wolk for the year 1969 with the explanation that certain checks were missing because his wife had retained them. (Tr. 84). Subsequently Special Agent Cappacio received from Mr. Wolk cancelled checks for the years 1969, 1970, 1971 and 1972. Wolk also turned over his records of bank deposits for checking accounts which

* Wolk's awareness of the obligation to file was also evidenced by his filing of a tax return in 1968, his requests for extensions to file for 1969 through 1972, his prior admissions to Revenue Officers Meyer and Myers that he had failed to file, as well as his broken agreement with Revenue Officer Meyer in January, 1972 to file his returns.

he maintained at Bankers Trust Co. and Manufacturers Hanover Trust Co. (Tr. 3-21, 26-39). The source of those deposits was fees received from various clients of Mr. Wolk for whom he had rendered legal services during the period in question. (Tr. 36-41, 46, 47, 56-57). Thus, all of the deposits into those bank accounts derived from income items. (Tr. 90).

On May 9, 1974 Special Agent Cappacio had a further interview with Wolk, who again agreed to file his income tax returns. Wolk specifically agreed to file for each of the four years by the end of May. On June 24, 1974 Cappacio received by messenger four unsigned tax returns for the years 1969 through 1972. (GX 36-39).* In these unsigned returns Wolk reported his gross income for the years in question as follows:

1969	$37,620
1970	44,578
1971	68,222
1972	63,377. (Tr. 96).

Special Agent Cappacio compared those figures with total bank deposits for each of those years and found substantial discrepancies. The records of the bank deposits reflected total deposits in each year as follows:

1969	$63,865.54	GX 26
1970	73,005.79	GX 27
1971	86,234.60	GX 28
1972	87,813.21	GX 29

---

* In April 1974, Wolk timely filed his tax return for the year 1973. On that return, as on his later returns for the years 1974 and 1975, Wolk used a taxpayer identification number, 131-96-9364, which he later conceded to be incorrect. As reflected on his 1968 return, his true Social Security number was 131-24-9146.

At a subsequent interview, Cappacio questioned Wolk as to the disparity between the deposits and his reported gross income. Wolk stated the difference was due to certain "wash transactions," however, he was unable to produce records to support the fact that these "wash transactions" had taken place. (Tr. 97). Wolk also claimed that moneys which were held by him in escrow were placed in his personal account. (Tr. 94). When asked why he had not paid the taxes for the years 1969 through 1972 Wolk stated, (contrary to the reasons later asserted at trial), that he did not have the money at the time. (Tr. 102, 225, 286).*

The Government also offered evidence to demonstrate Wolk's ability to manage complex affairs during the years in question. Representatives from several companies for whom Edmund Wolk rendered legal services testified that during the years 1969 through 1972 he represented them in complex real estate matters. During this period Wolk also filed a timely estate tax for his father's estate of which he was an executor. His services in that capacity were satisfactory and timely. (GX 2; Tr. 41-45, 54-55, 59-60). By stipulation it was agreed that Mr. Wolk received management fees during the years 1971 and 1972 in the amounts of $3,500 and $5,000, respectively, for services rendered to his father's estate. (Tr. 78).

---

* The defense established that for each of the relevant years the tax due was as follows: for 1969, $2,034.20; for 1970, $1,582.20; for 1971, $4,485.67; for 1972, $4,910.68. The Government established that contrary to Wolk's claim that he lacked the money to pay his taxes, in March and April 1971, when taxes for 1970 were due, Wolk's account at Merrill Lynch Pierce Fenner & Smith reflected a balance of almost $5,000 resulting from short swing stock transactions in Twentieth Century Fox and Berkey Photo Inc. (GX 31; Tr. 73-77).

B. The Defense Case

Edmund Wolk testified he was a graduate of Cornell Law School, with a Master of Laws in taxation from New York University. He was admitted to the bar of the State of New York in 1956. (Tr. 195). Wolk had been married, but he obtained a divorce in the fall of 1972. Upon the termination of the marriage, Wolk retained custody of two small boys of this union. Mr. Wolk stated his marriage was not an altogether happy one and after the birth of the second child in 1970 his marital difficulties increased. (Tr. 201-06). The essence of his defense was that during this period of heightened marital tensions from 1969 to 1972, he was unable to cope with his obligations sufficiently to file his tax returns.

On cross-examination he conceded that during this period he had functioned as a lawyer in housing and complex real estate matters and his clients trusted him with large sums of money. (Tr. 219). He also prepared and timely filed his father's complex estate tax return. (Tr. 221-223). Wolk also admitted he had specialized in tax matters and that he knew he had to file income tax returns on April 15th. (Tr. 228, 230).

When questioned as to why his returns for 1973, 1974 and 1975 contained a different taxpayer number than his earlier returns, he indicated he just entered the number from a partnership form that West & Wolk received from IRS despite the fact that the partnership had terminated in 1968. (Tr. 215, 231-32). Wolk stated he did not know that the number to be inserted in the space labeled "taxpayer identification number" on the income tax form was his Social Security number. He also testified he did not know his own Social Security number. (Tr. 231-32).

Mr. Wolk's own testimony revealed the hollowness of the marital discord defense. Mr. Wolk stated he had no marital difficulties in 1969 and during that year he functioned as a lawyer in complex litigation matters. (Tr. 236). In 1970, the first year in which he failed to file* and the year in which his marital difficulties allegedly began, he appeared in court, rendered services in complex legal and financial matters and functioned as an attorney. (Tr. 242-43). His estimated gross income for 1970 was $44,518. (GX 37).

By 1971, his marriage had begun to deteriorate seriously but he continued to go to work regularly and to render services to clients in complex matters which on occasion required court appearances. Mr. Wolk took on an associate, Mr. Zankel, to assist him in his practice. He was also able to conduct profitable short swing stock transactions. (Tr. 249-58). Mr. Wolk estimated his gross receipts for 1971 at $68,222. (GX 38).

Mr. Wolk admitted that in 1972 at a time of great marital discord, he went to work, rendered legal advice and prepared his father's estate tax return for an estate with assets in excess of $750,000. (GX 2; Tr. 260). Mr. Wolk stated the estate tax return was timely filed because of the beneficiaries involved and that for the years 1971 and 1972 he had received as management fees $8,500 for running the properties of his late father. (Tr. 267-70). In the year 1972 Wolk estimated his gross income as $63,377. (GX 39).

The defense called several former business associates who testified to various shouting matches between Mr. and Mrs. Wolk in 1971 and to the tensions that Mr. Wolk was under in 1972. (Tr. 145, 151, 197). However, each

---

* The 1969 returns should have been filed in 1970.

such witness affirmed that during the period in question Wolk functioned as a competent lawyer in complex legal matters. (Tr. 144, 163, 169, 174, 192).

ARGUMENT

POINT I

The Court's Instructions to the Jury Were Entirely Proper.

A. The Civil Liability

As his first point on appeal, Wolk argues that the District Court instructed the jury that his taxes could only be collected if the jury convicted him in the criminal case. This argument is constructed by attaching a strained and far-fetched reading to Judge Bonsal's charge on the purpose of the criminal tax laws. Given its natural meaning, the charge was entirely correct.

The challenged instruction was as follows:

> "Now, you might ask yourselves, ladies and gentlemen, why did Congress make this a crime? Of course, the answer to that is that our tax system is in the nature of an honor system. We are all supposed to file our tax returns, and we are supposed to pay our taxes. And if somebody doesn't file a tax return so the government cannot collect the tax that might be owed then, he is, in effect, passing that burden on to other people.
>
> So the Government has got to collect the money somehow. We all read about that.

> Passing a burden on to somebody else, getting out of it themselves, violating what I have called the honor system. And that is the reason the Congress takes a very serious view of this, and the reason why the Congress in this statute makes it a crime to willfully fail to file a tax return." (Tr. 328-29).

This instruction finds support in benchmark tax cases, such as *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938); *Spies* v. *United States*, 317 U.S. 495, 496 (1943) and *Sansone* v. *United States*, 380 U.S. 343, 350 (1965). The obvious import of the instruction is that the smooth functioning of the tax system in this country depends upon voluntary reporting of income by all taxpayers. In this context, the specific phrase about "[p]assing a burden on to somebody else," refers to the effect on all honest taxpayers who are forced to bear the burden shifted to them by dishonest citizens who fail to report their income.

Although this instruction was quite apparently part of the generalized description of the tax system and the purpose underlying the criminal tax laws, Wolk attempts to convert it into a charge that he would escape his civil liability if not convicted of the criminal charge. However, nothing in this portion of the charge referred to Wolk's individual case and nothing was said about the Government's ability to collect taxes after an acquittal in a criminal case. The instruction, which must be considered in its context, simply does not support the imaginative gloss which Wolk tries to place upon it.

Wolk attempts to bolster his position by linking his objection to this instruction to the denial of his request to charge on the distinction between civil and criminal liability. In fact, there is no need to charge a jury in a tax case on this difference between civil and criminal liability. Wolk cites no law creating such a requirement

and, indeed, the existing law on this issue supports a refusal to so charge. *United States* v. *Bourque*, 541 F.2d 290, 296 (1st Cir. 1976); *United States* v. *Merrick*, 464 F.2d 1087, 1093 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972).

However, as Judge Bonsal stated in denying the request to charge, he thought it unnecessary because he had covered the point in his instructions at the outset of the case. (Tr. 290). Thus contrary to Wolk's bald assertion that the jury was never "told that defendant's [sic] civil tax liability bore no relationship to the criminal charges," (Br. 16), Judge Bonsal explained that very fact at the time of the voir dire, as follows:

> "This case involves criminal charges as distinguished from civil charges against the defendant Edmund Wolk. An information filed by United States Attorney charges Wolk with wilful failure to file federal income tax returns for calendar years 1969-1970-71-72 in violation of United States Code."
>
> * * *
>
> "The charge here, I should say this to you, the charge, I mentioned to you is a criminal charge it is failure to file tax returns. It isn't a question of what the tax liability is, if any, it is merely that the defendant is charged with wilfully failing to file tax returns." (Tr. 7/7/76, Voir Dire of Prospective Jurors).

If this did not suffice to alert the jury to the need utterly to divorce the question of civil liabilities from the criminal case, defense counsel's opening statement did that and more. In opening to the jury, defense counsel told the jury the following:

> "In other words, whether or not there is any tax owing or not owing has nothing to do with this case at all. Whatever your verdict will be has

> nothing to do with the civil aspect or whether or not there is tax due or not due. This is not part of this case.
>
> "*Whatever your verdict is, if there is a tax which has to be paid, it will be paid.* It has nothing to do with this case". (Tr. 11). (Emphasis added).

Thus, defense counsel told the jury, without objection from the Government or correction by the District Court, that whether they convicted or acquitted, the defendant not only would be required to pay his taxes, but would indeed do so. Having made this statement to the jury, including the improper promise that Wolk would pay his taxes at some time in the future, the defendant is in no position to argue that the jury was given the idea that he would not be required to pay his taxes if he were acquitted.*

In sum, although no such instruction was required, the jury was told by the District Court that the criminal and civil liabilities were unrelated to each other. Defense counsel impressed the point on the jurors, telling them not only that the obligation to pay the taxes would survive an acquittal but that Wolk would eventually pay even if acquitted.** These points having been explicitly

---

* Lest the jury forget the point, in summation, defense counsel reiterated: "what I stated right at the beginning of the trial. This is not a civil case. This is a criminal case". (Tr. 310).

** The tactical objective of this argument is evident. The jury might acquit a sympathetic defendant on the criminal charges on the theory the payment of the civil liability will be penalty enough. This was the objective, we submit, not only of defense counsel's remarks in his opening statement, but of the defendant's request to charge on the distinction between civil and criminal tax liability, which request concluded as follows:

> "Stated another way, should you find the defendant not guilty, such a verdict does not imply that he is absolved from any further civil tax liability."

stated to the jury, Wolk cannot persuasively argue that Judge Bonsal's general instructions on the purpose of the tax law must be read as an instruction that the taxes could not be collected absent a guilty verdict. Judge Bonsal simply did not say that, and defense counsel, without contradiction, assured the jury of the contrary.

B. The Charge on Wilfulness

The defendant's assignment of error to the charge on wilfulness is easily answered. Defense counsel requested a charge on wilfulness which included a requirement that the jury acquit unless it found that the defendant possessed "a state of mind which manifested a bad purpose or evil motive to violate the law." For this proposition, defense counsel's request to charge cited *United States* v. *Bishop*, 412 U.S. 346, 361 (1973). The Government sought a contrary instruction, namely, that bad motive and evil intent need not be proved. The Government's request to charge cited *United States* v. *Greenlee*, 380 F.Supp. 652 (E.D. Pa.), *aff'd.* 517 F.2d 899 (3d Cir. 1974), *cert. denied*, 423 U.S. 985 (1975). *United States* v. *McCorkle*, 511 F.2d 482 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 826 (1975); *United States* v. *Pohlman*, 522 F.2d 974 (8th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976).* It also cited *United States* v. *Bishop*, *supra*. At the charge conference, each side pressed its position. After hearing argument on this issue from both sides,

---

* Although not cited to the District Court, other cases to the same effect are *United States* v. *Ducharme*, 505 F.2d 691, 693 (9th Cir. 1974); *United States* v. *Hawk*, 497 F.2d 365, 366-369 (9th Cir. 1974); *United States* v. *Platt*, 435 F.2d 789, 793-95 (2d Cir. 1970).

Judge Bonsal indicated he would read the law and decide how to charge on this point. (Tr. 286-90).*

When the court delivered its charge, it did not charge bad motive as part of the definition of wilfulness.** As

---

* Defendant argues that defense counsel was misled into believing that Judge Bonsal would charge that evil motive was necessary. (Br. 20). This argument is disingenuous. Although the defendant quotes that portion of the record where Judge Bonsal stated he would so charge, (Tr. 287), he neglects to mention that further argument from the Government caused the court to reconsider and ultimately to leave the question up in the air. (Tr. 289). In any event, defense counsel did not refer to bad motive in his summation, and thus, it is difficult to see how it can now be argued on appeal that defense counsel was misled to his prejudice.

** The District Court's careful charge on wilfulness was as follows:

> The third element which is really the vital one was the defendant, if you find he failed to file income taxes, was he acting willfully, knowingly and unlawfully? That is the crucial element for you to consider on the evidence which you have heard.
>
> In other words, did the defendant have criminal intent, willfully, to fail to file the return.
>
> How do you determine that, ladies and gentlemen? Well, of course an act, or really this is a failure to act, if you don't file a return you are failing to act, I suppose, but an act or failure to act is done knowingly and willfully if it is done voluntarily and purposefully. An act, or, again, a failure to act, is done willfully, knowingly and unlawfully if it is a voluntary and intentional violation of a known legal duty.
>
> Well, here if the defendant knew he was required to file a tax return by April 15th of the year in question and intentionally failed to do so, then he would have willfully failed to file a tax return under the statute which I reviewed with you.
>
> On the other hand, ladies and gentlemen, an act is not done wilfully or knowingly or unlawfully if it is done by mistake, if it is done by carelessness or if it is done by other innocent reason.

[Footnote continued on following page]

the United States Supreme Court has subsequently made clear, this was the correct interpretation of *United States* v. *Bishop, supra.* In *United States* v. *Pomponio*, Dkt. No. 75-1667, 45 U.S.L.W. 3277, 3278 (Oct. 12, 1976), the Supreme Court specifically sought to correct the misimpression created by the reference in *United States* v. *Bishop, supra,* to bad motive.* Reversing the Fourth Circuit Court of Appeals' expansive interpretation of the

---

> Now, obviously it is impossible to prove exactly what this defendant knew or what his intentions were in and around April 15th of these years. We can't look into his mind and see what knowledge he had at the time to determine his specific intentions.
>
> But these are matters which you, the jury, can determine by a careful consideration of the facts and circumstances which were brought out during the trial.
>
> The knowledge and intentions, the willfulness of the defendant may only be understood when put in the context of the circumstances surrounding his acts at the time and the inferences which you, the jury, find may be reasonably drawn therefrom.
>
> You might ask yourselves whether you felt that the defendant's actions or lack of it here were normal or abnormal, whether you think the background of the defendant made it likely or unlikely that he fully understood what he was doing.
>
> Whether you think the defendant had a motive, whether you think he had a financial or other interest in doing or not doing what he did. These are the kinds of questions and not the only ones, ladies and gentlemen, that you should ask yourselves in order to determine the willfulness, the willfulness of the defendant. And I don't suggest any answers to the questions, because, after all, in your own daily affairs you are continually called upon to use your common sense and experience to determine from the actions or statements of others what their real intentions and purposes are. And, please, do that with respect to this defendant. (Tr. 332-34).

* Although defendant's brief cites *United States* v. *Pomponio*, by excerpting from it the troublesome language in *Bishop* which *Pomponio* quotes, the defendant manages to present *Pomponio* as standing for a proposition which is precisely the opposite of its holding.

dicta in *United States* v. *Bishop*, *supra*, the Supreme Court held that under 26 U.S.C. § 7206 a definition of wilfulness need not include a reference to bad purpose or evil motive. Citing with approval *United States* v. *Pohlman*, *supra*, *United States* v. *McCorkle*, *supra*, and *United States* v. *Greenlee*, *supra*, (on which the Government relied in the District Court here), the Supreme Court stated that "wilfulness in this context simply means a voluntary, intentional violation of a known legal duty." 45 U.S.L.W. at 3278.

Here, Judge Bonsal charged that wilfulness meant "a voluntary and intentional violation of a known legal duty." This comports entirely with the holding of *Pomponio*, which is dispositive of this issue.

POINT II

The Trial Court's Evidentiary Rulings Were Correct.

A. The Social Security Number

Wolk argues that the District Court erroneously permitted the Government to prove that in the years immediately following his failure to file four tax returns, he filed his tax returns under a social security number which was not his own. When this evidence was offered, defense counsel objected on the ground that it was beyond the scope of the charges. (Tr. 17). The Government responded that the offer was made on the issue of wilfulness. (Tr. 17). The trial court properly overruled the objection.

In balancing the probative value of evidence against its prejudicial effect, F.R. Evid. 403, the trial court may exercise its discretion and will be reversed only if the exercise of discretion is abused. *United States* v. *Albergo*,

539 F.2d 860, 863 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3416 (1976); *United States* v. *Wiener*, 534 F.2d 15, 18 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3249 (1976). The objection taken in the trial court, and reasserted again on appeal, was that evidence of events subsequent to the crime and prior to the commencement of the tax investigation could not be relevant for any purpose. This contention is legally incorrect. Evidence of subsequent acts is admissible on the issue of intent. *United States* v. *Grady*, Dkt. No. 76-1201, slip op. 291 (2d Cir., Oct. 27, 1976); *United States* v. *Viruet*, 539 F.2d 295 (2d Cir. 1976). The rule is no different in establishing wilfulness in a tax case such as this. *United States* v. *Greenlee*, 517 F.2d 899, 903-05 (3rd Cir.), *cert. denied*, 423 U.S. 893 (1975); *United States* v. *O'Connor*, 433 F.2d 752, 754 (1st Cir 1970), *cert. denied*, 401 U.S. 911 (1971).

From the evidence that Wolk used an incorrect social security number for three years after the four years in which he failed to file, the jury could infer that he was attempting to conceal his earlier failures to file. In early 1974, when he filed a return for the year 1973 under a number other than his own, he realized that he had been able to avoid paying taxes without bearing any serious consequences. Although Revenue Agents had made inquiries and a Special Agent had interviewed him, thus far his promise to file and his show of cooperation appeared to satisfy the IRS. Against this background, it was fair to conclude that Wolk decided to begin filing returns under a different social security number in the hope that doing so would prevent an IRS computer from flagging his failure to file in the prior four years. The evidence was admissible to support this inference on the question of wilfulness.

Wolk attempted to counter this evidence by explaining the different social security number as an innocent mistake resulting from the use by the IRS of the second

number on tax forms mailed to him. Although he assigns error to the trial court's refusal to admit the actual forms into evidence, his full explanation was placed before the jury on his direct examination.* The essence

---

* The pertinent part of the record reads as follows:

Q. I show you Defendant's Exhibit B marked for Identification and ask you what that is (handing)?

A. Well, this is a package of forms that were sent to my by the Internal Revenue Service at my office address, and the number indicated on the form here——

The Court: Wait a minute. Just tell us first of all what that is . When did you see that?

The Witness: Frankly, it's for the 1975 U.S. partnership return of income form, but it is addressed to me individually, not West & Wolk, and I must have received it sometime in the beginning of 1976. I received similar ones beforehand .

Mr. Todel: At this time defendant offers in evidence Defendant's Exhibit B.

Mr. Batchelder: Objection as relevance.

The Court: I am going to sustain the objection.

Mr. Batchelder: Your Honor, if it is a sustained objection he is going to ask him about what is the number, and the government will object again. At least that is what he has been doing.

The Court: In fairness, I am not going to receive the exhibit, but if Mr. Wolk has any explanation of the number —you say you took down the number. What is the number?

The Witness: Well, last night when I went back to the office——

The Court: No, no. Don't tell us about when you went back to the office. Tell us about the number.

The Witness: 131-969-364 was the number that the gentleman from Brookhaven testified to. Not last night, it was early this morning. I went into the office to see how I could put that type of number down, and I found this instrument, I had taken a number of an instrument that was written to me indicating that it was addressed to me, and I thought that was my Social Security number when I put it down.

[Footnote continued on following page]

of that explanation was Wolk's claim that he mistakenly used the taxpayer identification number from his partnership tax forms in filing his personal returns for 1973, 1974 and 1975.

Having presented that explanation, nothing would have been added to his evidence by admission of the actual forms. The Government did not dispute Wolk's contention that the second number derived from the partnership tax forms. It merely contended that it was incredible that the change in number was a mistake because people generally know their own Social Security number well enough to avoid such errors. (Tr. 230-32, 298, 300). In other words, the Government contested the explanation as incredible even if one accepted the fact that, as Wolk testified, the second social security number derived from his partnership tax forms.

The actual forms were thus of collateral import and were also cumulative of Wolk's testimony. As such, they were excludable. F.R. Evid. 403. Even without the exhibit, defense counsel was able to argue from the defendant's testimony that Wolk obtained the second identification number on a form which was sent to him. (Tr. 315). On this record, Judge Bonsal's decision to exclude the actual forms was not erroneous.

The Court: Well, what you're saying is that you put down the number that had been on some form that you might have received in the past?

The Witness: Yes. And then that was for 1973. In 1974 and 1975 I simply copied the one that was on the previous return. So I didn't even——

The Court: All right.

Mr. Todel: If the Court please——

The Court: No, I'm not going to receive it. He explained that. I think what he is trying to explain is the testimony yesterday about the different number, and you say the second number you took off the form.

The Witness: I thought that was the number I was supposed to use, because it was on a form addressed to me personally.

The Court: All right. (Tr. 198-200).

B. The Bank Deposits

As his next challenge to the trial court's evidentiary rulings the defendant advances the contention that the court improperly admitted into evidence his bank statements for the relevant years. He argues that there was no evidence that the deposits into these checking accounts constituted income and accordingly the evidence was not probative. This claim ignores the record.

Contrary to Wolk's assertions, the evidence established that the deposits into the accounts were income. Wolk told Special Agent Cappacio in the meeting of November 7, 1973 that all items deposited in the account were income items. (Tr. 84, 90). Subsequently, when confronted with disparity between his bank deposits and his estimated gross earnings as set forth on his unsigned tax returns for the years 1969 through 1972, Wolk stated that the disparity was caused by wash transactions, but he could supply no proof to substantiate his explanation. (Tr. 97). This was sufficient evidence from which the jury could conclude that these deposits constituted income.

In arguing that without the bank deposits, the Government had "sufficient evidence to establish that the defendant had earned in excess of $1200 for the calendar years 1969, 1970, 1971 and 1972," (Br. 28), Wolk suggests that the Government's evidence in a tax case must be limited to a showing that the defendant's income exceeded the level necessitating a filing of a return. There is no such rule of law. *See, e.g., United States* v. *Bianco*, 534 F.2d 501 (2d Cir. 1976). This evidence was admissible not only to establish that Wolk had sufficient income to require him to file, but also to show the wilfulness of his failure to file. *United States* v. *Baird*, 414 F.2d 700, 702 (2d Cir. 1972), *cert. denied*, 396 U.S. 1005 (1973); *United States* v. *Macleod*, 436 F.2d 947, 950 (8th Cir.), *cert.*

denied, 402 U.S. 907 (1971); *Lumetta* v. *United States*, 362 F.2d 644, 646-647 (8th Cir. 1966).

With respect to the chart of the deposits, Wolk claims that the chart was on view during the entire trial. There is nothing in record to support this assertion and, moreover, it is not correct. The chart was stored under Government counsel's table prior to admission and was returned, at Judge Bonsal's request, to the side of the table after its introduction into evidence. Of course, the admission of the chart was wholly proper. *United States* v. *Nathan*, 536 F.2d 988 (2d Cir. 1976).

C. The Separation Agreement

Finally, Wolk argues that the trial court improperly excluded evidence of his intent to file, as contained in a separation agreement signed in 1972. The issue first arose when the defendant called an attorney, Harvey I. Sladkus, and sought to offer the agreement through him. (Tr. 179-82). Judge Bonsal refused the offer at that time, stating that it was better made during the testimony of the defendant, who was expected to take the stand in his own behalf. (Tr. 182).

During Wolk's testimony, the exhibit was reoffered. (Tr. 207). The court noted that the agreement contained a false representation that the Wolks had filed federal tax returns as of August 1972. (Tr. 208). The court then excluded the evidence. (Tr. 209).

This ruling was entirely correct. Wolk testified that he always intended to file his tax returns. (Tr. 207, 209). The separation agreement, which was offered for its statement that the parties agreed to sign joint tax returns for years not previously filed, was no more than a self-serving, prior consistent statement to the same

effect. *See United States* v. *Walker*, 502 F.2d 1214 (2d Cir. 1974). Prior consistent statements are hearsay and subject to exclusion as such, unless offered to rebut a charge of recent fabrication. F.R. Evid. 801(d)(1)(A). The purpose of the rule is explained as follows: "Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force. . . ." 4 Weinstein & Berger, *Evidence* § 801(d)(1)(B)[01] at 801-100 (1975). The exclusion of the evidence was particularly appropriate here since the hearsay was embodied in a legal document and the format alone may have caused the jury to give the statements contained in it undue credence.

Finally, even though Judge Bonsal explicitly ruled that the agreement would be excluded, defense counsel attempted with some success to slip the matter before the jury anyway. Thus, immediately after Judge Bonsal ruled, defense counsel proceeded with Wolk's direct examination in the following way:

> Q. Mr. Wolk, you stated a moment ago that you intended to file your income tax returns; is that correct?
>
> A. Yes, I did.
>
> Q. Did you make this knowledge known at any time?
>
> A. Yes.
>
> Q. How did you make this knowledge known?
>
> A. Well, among other things, I filed for the extensions, every time I filed for extension I really was hoping that I would be able to get to the work get my records together. I had no records during that period of time. I didn't even have checks. I didn't have bank statements. I didn't know where the hell anything was. I was just hanging

on doing the best I could for whatever I could do at the time. I then——

Q. In 1972 did you make it a matter of record?

A. Yes, I did. In the negotiations with my wife I knew I was going to have to file a tax——

The Court: Wait a minute. That doesn't answer the question really. I don't know what the question means, did he make it a matter of record, Mr. Todel.

The Witness: Yes. I even told my——

The Court: No, no.

Q. Did you sign any agreement with reference to that?

Mr. Batchelder: Your Honor, objection, please.

The Court: Did he what?

Mr. Todel: Sign any agreement with reference to filing of income tax returns.

The Court: When? Oh, no this comes back to the same thing. Oh, no please. I sustain the objection. Don't keep doing this. (Tr. 209-10).

Thus, before being cut off, defense counsel established that in 1972 Wolk had made his intention to file tax returns a "matter of record." Although the objection to further inquiry was sustained, the testimony about his prior consistent statement was never the subject of a motion to strike. It is difficult to see, in light of this, how that exclusion of the separation agreement, which was inadmissible evidence, can now be assigned as error.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

HARRY C. BATCHELDER, JR.,
RHEA KEMBLE NEUGARTEN,
AUDREY STRAUSS,
Assistant United States Attorneys
Of Counsel.

★ U. S. Government Printing Office 1976— 714—017—ASNY—526